

## The Atchison Topeka And Santa Fe

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F. W. Prince, Agent, 641 Market St. San Francisco Cal

## Sacramento Saloon

ANDY TODD, Prop.

The best of liquid refreshments always on tap, including imported  
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Good Cigars are a part of our stock.

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## The Eagle Market

Our Meats are the best, if you are not  
satisfied with the place you are trading  
call on us—Our motto is "The Best."  
A pleased patron means a steady customer

## The Eagle Market

IN THE DISTRICT COURT OF THE  
FIRST JUDICIAL DISTRICT OF  
THE STATE OF NEVADA,  
In and for the County of Ormsby.

Marion W. Buckley, Plaintiff  
vs.  
Joseph W. Buckley, Defendant.

Action brought in the District Court  
of the First Judicial District of the  
State of Nevada, Ormsby County, and  
the complaint filed in the said court  
in the office of the Clerk of said District  
Court on the 2d day of December,  
A. D. 1905.

THE STATE OF NEVADA SENDS  
GREETING TO  
JOSEPH W. BUCKLEY,

Defendant.

You are hereby required to appear  
in an action brought against you by  
the above named Plaintiff, in the Dis-  
trict Court of the First Judicial Dis-  
trict of the State of Nevada, Ormsby  
County, and answer complaint filed  
therein within ten days (exclusive of  
the day of service) after the service  
on you of this Summons is served in  
said county, or if served out of said  
county, but within the District, twenty  
days, in all other cases forty days,  
or judgment by default will be taken  
against you according to the prayer  
of said complaint.

The said action is brought to obtain  
the judgment and decree of this court  
that the bonds of matrimony here-  
before and now existing and uniting you  
and said plaintiff to be forever annu-  
led and dissolved upon the ground that  
at divers times and places since said  
marriage you have committed adultery  
with one Kate Cottrell, and particu-  
larly that from about the 9th day of June  
1900 to and including the 13th day  
of June, 1900, at the Charing Cross  
Hotel in the city of London, Eng-  
land, you lived and cohabited with  
said Kate Cottrell.

All of which more fully appears  
by complaint as filed herein to which  
you are hereby referred.

And you are hereby notified that if  
you fail to answer the Complaint, the  
said Plaintiff will apply to the Court  
for the relief herein demanded.

GIVEN under my hand and Seal of the  
District Court of the First Judicial  
District of the State of Nevada,  
Ormsby County, this 2d day of Decem-  
ber, in the year of our Lord one  
thousand nine hundred and five.

H. E. VAN HITTEN, Clerk.

(SEAL).  
Geo. W. Keith,  
Attorney for Plaintiff.

Notice of Application for Permission  
to appropriate the Public Waters of  
the State of Nevada.

Notice is hereby given that on the  
12th day of Sept., 1905, in accordance  
with Section 23, Chapter XLVI, of the  
Statutes of 1905, one Philip V. Michaels  
and Frank L. Wildes of Carson,  
County of Ormsby and State of Ne-  
vada, made application to the State  
Engineer of Nevada for permission to  
appropriate the public waters of the  
State of Nevada. Such application to  
be made from Ash Canyon creek at  
points in N E 1/4 of S W 1/4 of section  
10 T 15 N R 19 E by means of a dam  
and headgate and five cubic feet per  
second is to be conveyed to points in  
N E 1/4 of S W 1/4 of section 11,  
T 15 N R 19 E, by means of a flume  
and pipe and there used to generate  
electrical power. The construction  
of said works shall begin before June  
1, 1906, and shall be completed on or  
before June 1, 1907. The water shall  
be actually applied to a beneficial use  
on or before June 1, 1908.

Signed:  
HENRY THURTELL,  
State Engineer.

### SCHOOL APPORTIONMENT. STATE OF NEVADA.

Department of Education,  
Office of Superintendent of Public In-  
struction.

Carson City, Nevada, July 11, 1905  
To the School Officers of Nevada:

Following is a statement of the sec-  
ond semi-annual apportionment of  
School Monies for 1905, on the basis  
of \$6.990202 per census child:

Counties	children	Amt.
Churchill	135	\$ 945.68
Douglas	317	2,215.90
Hike	1,129	7,829.02
Esmeralda	217	1,516.97
Eureka	339	2,719.20
Humboldt	743	
Lander	313	
Lincoln	964	
Lyon	69	
Nye	92	
Ormsby		
Storey	93	
Washoe	2,412	16,860.26
White Pine	525	3,669.26
Total	9,439	\$65,917.61

Joe Platt has received samples of  
tailor made suits which are with-  
out doubt the finest ever shown in  
this city. A number of suits have  
already been made and they are per-  
fect fits in every case. Get your  
measure taken and do it before the  
best samples are gone. No guaran-  
tees as to fit or no pay.

### SUPREME COURT DECISION.

IN THE SUPREME COURT OF THE  
STATE OF NEVADA.

Ronan Gulling, Executor, and Charles  
Gulling, Executors of the Estate of  
Martin Gulling, deceased.  
Respondents.

Washoe County Bank,  
Appellant.  
Messrs Goodman and Webb, Dodge and  
Parker, Attorneys for Respondent.  
Messrs Cheeney and Massey, Attor-  
neys for Appellant.

#### OPINION

On March 1, 1893, James Pollocks,  
his wife Della and Daniel Powell, who  
are admitted to have been the owners  
at that time, executed to B. U. Stein-  
man and C. H. Cummings as trustees,  
a trust deed for certain property near  
Reno to secure the payment of a prom-  
issory note of the same date given  
by the Pollocks and Powell to Farm-  
ers and Mechanics Savings Bank of  
Sacramento for \$3,000 and interest.  
This deed directed the trustees in  
case of default in payment, to sell  
the property at Sacramento after giv-  
ing notice, to apply the proceeds in  
satisfaction of the note and costs of  
sale and to pay any excess to the  
grantors.

On August 31, 1895, the Pollocks  
and Powell executed to Martin Gulling  
a mortgage on the same premises for  
\$2,082.60, and interest thereon from  
that date at eight per cent per annum,  
which is sought to be foreclosed in  
this action and which specified that  
it was given subject to the trust deed.  
On February 23, 1897, the Pollocks  
and Powell conveyed their interest in  
the property to Washoe County Bank  
for a stated consideration of \$14,000.00,  
which comprised the amount of \$3,800,  
estimated to be due to the Farm-  
ers and Mechanics Bank of Sacramen-  
to on the note secured by the trust  
deed and \$5,200 due from the Pollocks  
and Powell to the Washoe County  
Bank on unsecured notes which were  
surrendered to them. On February  
26, 1897, the Farmers' and Mechanics'  
Savings Bank commenced suit to re-  
cover the amount due on its note stated  
at \$8,639.73, and for a foreclosure of  
the trust deed and sale to satisfy that  
amount against the Pollocks, Powell,  
Thomas E. Haydon, Henry Anderson,  
John Doe, Richard Roe, Michael Doe,  
B. U. Steinman and C. H. Cummings.  
Neither Martin Gulling nor the Wash-  
oe County Bank were named as par-  
ties in the complaint, but both were  
served with summons under the fic-  
ticious designations of defendants who  
were alleged to have some title, claim  
or interest which was second and sub-  
ordinate to the right of the Farmers'  
and Mechanics Bank arising from the  
trust deed. On March 8, 1897 Martin  
Gulling filed an answer in that action  
in which the name of Washoe County  
Bank is not mentioned in the title,  
body or prayer. It stated that its  
allegations were made "in obedience  
to summons therein issued and served  
upon him and answering the com-  
plaint therein." In this answer he  
admitted the priority of the claim of  
the Farmers and Mechanics Sav-  
ings Bank under the trust deed,  
thereby avoiding any real issue  
with the plaintiff, but he alleged  
the execution of the mortgage to him  
by the Pollocks and Powell, that other  
persons claimed an interest in the  
premises which was subsequent to his  
mortgage, and he asked for judgment  
against the mortgagors for principal,  
interest and attorney fees, for the  
usual decree of sale, that the proceeds  
be applied first to the satisfaction of  
any judgment which Farmers' and  
Mechanics Bank might obtain, and  
second to the payment of any judg-  
ment he might recover, that he have  
execution for any deficiency against  
the Pollocks and Powell, and that they,  
Thomas E. Haydon, Henry Anderson,  
B. U. Steinman and C. H. Cummings  
and all persons claiming under them  
subsequent to the execution of his  
mortgage be barred and foreclosed of  
all right, claim or equity of redem-  
ption.

On March 26, 1897, twelve days after  
Gulling filed his answer, Steinman and  
Cummings, acting as trustees and af-  
ter notice given, sold the property at  
the court house door at Sacramento  
to the Washoe County Bank for \$1,100  
the amount due the Farmers' and  
Mechanics Bank on the note secured  
by the trust deed and the sum esti-  
mated for costs. Over four months  
later and on July 1, 1897, Washoe  
County Bank filed its answer without  
naming Gulling in its title and pre-  
faced its averments with the recital  
that "as required by summons served  
on said Bank and answering said  
summons and the complaint filed in  
said action" it made its allegations  
setting out the execution of the trust  
deed, the sale thereunder and the  
deeds from Steinman and Cummings  
as trustees and from the Pollocks and  
Powell to Washoe County Bank. These  
facts and they controlled the court  
later in its decision in that case, do  
not purport to be stated against Gulling.  
But directly after their state-  
ment as so alleged in answer to the  
complaint, follows an allegation in the  
nature of a conclusion of law,  
"that the equities of all the other de-  
fendants, including Gulling, were fore-  
closed and barred," and a demand for  
a decree accordingly against them and  
the plaintiff. This answer does not  
in any part of it purport to allege as  
a cross-complaint or in terms as  
against Gulling the sale under the  
trust deed by the trustees to Washoe  
County Bank, nor does it appear to  
have been served upon him. He filed  
no demurrer, answer or reply to it  
and the record indicates that he offered  
no evidence regarding it.

The case came to trial on January  
14, 1898. The plaintiff, Farmers' and  
Mechanics Savings Bank, and the de-  
fendants, Washoe County Bank, Gulling  
and Anderson, each appeared by  
counsel and Haydon in person. It is  
stated in the findings that the plaintiff  
having before the hearing made and  
filed a disclaimer of all interest in  
the action, and an admission that

Washoe County Bank had succeeded  
to the interest of plaintiff, thereupon  
rested. That Martin Gulling offered  
and submitted evidence and proof  
and thereupon rested and that Henry  
Anderson, Washoe County Bank and  
the defendants and each of them, hav-  
ing submitted evidence and proofs in  
support of the issues made by them  
in their answers, the case was sub-  
mitted to the court. The fair in-  
ference from the language and from  
the fact that he was first to submit  
proofs is that he introduced evidence  
to support the allegations of his an-  
swer which averred the execution and  
non-payment of his mortgage, but that  
he did not offer any in relation to  
other facts alleged in the answer of  
Washoe County Bank. The findings  
and decree in that action disposed of  
the claims of these other defendants  
and found and declared that the sale  
and deed made by the trustees was in  
accordance with the terms of the  
trust deed and that by such sale and  
deed all the interest in the property  
was conveyed to Washoe County Bank  
clear of Gulling's mortgage, and that  
the latter was entitled to a judgment  
for the amount due on his note but not  
to a degree of foreclosure. The find-  
ings recite that "defendant Gulling  
was made a party to the action and  
was duly served with process therein,  
and in due time filed his answer  
plaintiff's complaint," but it does not  
appear that there was any other ser-  
vice upon him, or issue made that  
rendered him liable beyond the allega-  
tions and demands of the complaint,  
or that would cut off his right by reason  
of the sale by the trustees which did  
not take place until after he had filed  
his answer. The court found in both  
actions that \$8,600.00, estimated to  
be the amount due the Farmers' and  
Mechanics Bank and notes held by  
Washoe County Bank against the  
Pollocks and Powell, for \$5,200.00 un-  
secured after the execution of the  
mortgage to Gulling, constituted the  
consideration expressed at \$14,000.00  
for the deed from them to Washoe  
County Bank, and that the property  
was worth about that sum at the date  
of the trustees' sale and the time of  
the trial.

A blank space in the decree in the  
first action for judgment in the  
amount owing by the Pollocks and  
Powell to Gulling on his note and  
mortgage remains unfilled. The case  
now before the Court was brought by  
Martin Gulling on June 9, 1902 against  
Washoe County Bank as grantee to  
foreclose his mortgage so executed  
on the premises by the Pollocks and  
Powell before they deeded to defend-  
ant, and is now prosecuted by the re-  
presentatives of his estate. The de-  
fendant pleads by way of estoppel,  
the judgment in the former action and  
claims that by it Gulling was, and his  
executors are, barred and foreclosed  
of all right to proceed against Washoe  
County Bank. The district court was  
of the opinion that in the earlier suit  
it did not have jurisdiction to make  
the judgment effective in quieting the  
title of appellant against Gulling,  
and it has now entered a decree of  
foreclosure and sale to satisfy his  
mortgage, from which this appeal is  
taken.

The important questions under the  
record and elaborate and interesting  
briefs are whether the matters re-  
lating to the trustees' sale determi-  
ned in the former action were within  
the issues as between Gulling and  
appellant, and if they were not,  
whether he waived the framing of  
issues so that he became bound by  
the decree. The facts stated in the  
complaint of Farmers and Mechanics  
Savings Bank averring the execution  
of the trust deed were not denied by  
any of the parties. The statute, at  
least in favor of the plaintiff, raised  
denials of the facts alleged in Gul-  
ling's answer. These were in regard  
to the execution and non-payment of  
his mortgage and did not relate to  
the trustees' sale which took place  
after his answer had been filed, and,  
therefore, if any issue existed re-  
garding this sale it must have been  
founded on the answer of the Washoe  
County Bank. On its behalf it is  
urged that the answers of Gulling  
and the Bank made a direct issue of  
his right to have the property sold  
to satisfy his debts, but this is dealing  
with conclusions and not with facts  
upon which issues are based. Gulling  
did not raise any issue regarding the  
trustees' sale for his only answer was  
filed before the sale and before the  
answer of the Washoe County Bank  
in which it was alleged, and did not  
mention the name of the latter.

On behalf of appellant it is urged  
that the only pleadings provided or al-  
lowed by the Practice Act for the al-  
legation of facts are a complaint by  
the plaintiff and an answer by a de-  
fendant, and that in determining the  
rights of co-defendants between them  
selves an answer is the only pleading  
permissible and that its allegations  
are deemed denied by statute, when  
it states a cause of action against a  
co-defendant, the same as if it relates  
new matter against a plaintiff. For  
respondent a different view is taken  
and it is claimed that under Rose v.  
Treadway, 4 Nev., 460, and other  
cases cited, that ordinarily the de-  
fendants in an action are not as be-  
tween themselves adversary parties,  
that they become such only when one  
files a pleading in the nature of a  
cross-complaint seeking affirmative  
relief against another, that when this  
is done they lose their identity as  
defendants and for the purposes of  
the cross-complaint assume the re-  
lation of plaintiff and defendant,  
that the one against whom the cross-  
complaint is filed is of necessity an-  
titled to all the rights of an adver-  
sary including that of being served  
with, and of having an opportunity of  
pleading to, the cross-complaint, and  
that the statutes saving failed to  
designate the methods of pleading be-  
tween co-defendants equity practice  
must be followed. If it be conceded  
for the argument that the statute as  
claimed for appellant, denies any new

matter which one defendant may al-  
lege against a co-defendant and that  
no answer or reply thereto is required  
it would still be a dangerous prece-  
dent, which we would be reluctant to  
establish, to hold that the statute de-  
nies for a co-defendant facts not al-  
leged against him but stated in the  
answer of another defendant to the  
complaint, or that an issue would be  
submitted against a co-defendant by an  
answer filed without service of an an-  
swer containing new matter alleged  
against the complaint of the plaintiff.  
The answer of Washoe County Bank  
in the former suit not having been  
served upon Gulling, and he having  
filed no demurrer, answer or reply to  
it, which would have been a waiver  
of service, we feel constrained to hold  
that it raised no issue against him,  
and if we concede for the purposes  
here that denial by statute without  
any pleading in reply is sufficient be-  
tween co-defendants, such denial  
ought not to become operative before  
service. White v. Patton, 87 Cal. 151;  
Clements v. Davis, 17 Ind. 631. To  
hold otherwise or establish a different  
practice, might cause litigants to suf-  
fer a great injustice. An answer to  
a complaint ought to be served upon  
the plaintiff but if it is not he may  
be expecting it, or to secure a de-  
fault, he could not obtain judgment  
without being aware of it, and would  
not be likely to go to trial without  
being prepared to meet the statutory  
denial in his behalf of any new mat-  
ter it alleged. It is different between  
co-defendants. Usually their interests  
are not adverse, except to the plain-  
tiff, and one defendant may not ex-  
pect that another defendant will set  
up a cause of action and seek a judg-  
ment against him, and if he does he  
should not be required to watch the  
court records as Gulling could have  
done for over four months after his  
answer was filed to ascertain whether  
any of his co-defendants filed a cross-  
complaint against him, in order that  
answer was filed, to ascertain whether  
he might be prepared to meet it. Un-  
til he is warned by service of the  
pleading and demand or waives ser-  
vice or issue, he ought not to be  
bound by any judgment based upon it.

If the Farmers' and Mechanics' Sav-  
ings Bank, instead of the Washoe  
County Bank had bought the property  
at the trustees' sale and relied upon  
its purchase, necessarily it would have  
pleaded the fact by supplemental  
complaint, and they would not have  
been considered denied by Gulling's  
answer to the original complaint, and  
without service upon or waiver of  
service by him, a valid judgment based  
upon facts occurring after he had  
been served with the original com-  
plaint and filed his answer thereto,  
could not have been taken by default  
against him. In Mitchell v. Mitchell,  
79 P. 50, 28 Nev., we set aside the  
action of the district court whereby  
it granted a plaintiff relief not de-  
manded in the complaint served upon  
the defendant. That was pursuant to  
statute, but there is no more reason  
for holding a defendant liable on a  
judgment based on a cross-complaint  
or pleading of a co-defendant without  
service, than on one resting on a com-  
plaint of a plaintiff which has not  
been served. In neither case should  
the rights of the parties be concluded  
without service or a waiver thereof.

It is said that service of the answer  
of the Washoe County Bank will be  
presumed. The judgment roll and  
the papers in the first case were  
introduced on the trial and are  
brought here in the statement on ap-  
peal, and the case rests upon them  
and not upon presumptions, and the  
burden of establishing estoppel is up-  
on the defendant. If any admission  
on affidavit of service was made it  
should be among these papers but none  
appears and therefore we must con-  
clude that the answer was not served.  
The return of the Sheriff and recital  
in the findings indicate that Gulling  
was served with summons, and the  
findings state that in due time he ap-  
peared and filed his answer to the  
complaint. Under these circumstan-  
ces further service will not be pre-  
sumed. Galpin v. Page, 18 Wall, 366.  
Beyond that appellants answer in  
the present case does not allege that  
the answer of Washoe County Bank  
was served upon Gulling in the other  
suit and is defective in this vital  
respect. Its allegations follow the facts  
disclosed by the record of the former  
action which show no service, and  
it states the conclusion that by the  
filing of the former answer an issue  
was raised against Gulling.

Numerous cases are cited by ap-  
pellant holding that by going to trial on  
new matter alleged in the answer with-  
out a reply thereto, a reply is waived  
even in states where the statute pro-  
vides for one. If this be the rule or-  
dinarily in actions between a  
plaintiff and defendant or where  
by cross-complaint new mat-  
ter is alleged against a co-de-  
fendant, and the latter appears  
and introduces evidence in regard to it  
the rule ought not to apply to cases  
like the present one where the co-  
defendant is in court for other pur-  
poses and the answer is in reply to  
the complaint and does not state the  
new facts as a cross-complaint or  
cause of action against the co-defend-  
ant, and he introduces no evidence con-  
cerning it, and other parties partici-  
pate in the trial. There being no ser-  
vice upon Gulling, no demurrer, an-  
swer, reply or testimony by him in re-  
lation thereto, the allegations in the  
answer of Washoe County Bank stat-  
ing the facts in relation to the sale  
and deed by the trustees which con-  
trolled the court and which are di-  
rected against the complaint and not  
against Gulling, are too slender a  
basis to sustain the judgment against  
him. The respondent contends, he  
could be in court for some purpose  
and not for others. He could be  
brought as far as process or proper al-  
legations and demands had been served  
upon him in the extent that he had  
waived time or made other issues him-

self, without becoming liable further.  
This is well illustrated by the find-  
ing conclusion and direction of the court  
that Gulling have judgment against  
the Pollocks, and Powell for the  
amount due on his note and mortgage.  
If the space left for this in the judg-  
ment has been filled, or if the court  
has made a decree of foreclosure in  
favor of Gulling, both would have been  
void against the Pollocks and Powell  
for lack of service as is the judgment  
against them based on the trustees  
sale and it has been held that if one  
of the parties to a judgment is not  
bound, the other is not. They had  
been served by the Savings Bank  
with complaint or summons seeking  
the foreclosure of the trust deed and  
filed a demurrer. For the purpose of  
that complaint and to the extent of its  
demands they were in court or were  
bound, but a judgment against them  
for the amount or foreclosure of the  
Gulling note and mortgage, when they  
had not been served with pleading or  
process regarding these would have  
been void. The court has jurisdiction  
of the subject matter of all questions  
involved in this litigation, but of the  
parties no further than they presented  
themselves or were served with plead-  
ings or process or waived service or  
issues. If a complaint and summons  
on a demand for one thousand dollars  
is served upon a defendant, a judg-  
ment for ten thousand would be void,  
because the district court would have  
jurisdiction over him to the extent  
of only one thousand, while as far as  
subject matter is concerned, it has  
jurisdiction in any amount.

The facts were quite different and  
the principal involved distinguishable  
in Maples v. Geller, 1 Nev., 238.  
There an answer which did not de-  
mand judgment upon new matter was  
filed to the complaint but not served.  
The question was not between co-de-  
fendants. The court said that the  
filing of the answer gave it jurisdic-  
tion over the defendant. Stripped of  
dicta that decision properly deter-  
mined that the filing of an answer  
to the complaint without service pre-  
vents a judgment for the plaintiff  
by default. While here we hold that  
property rights cannot be lost or ad-  
judicated upon an answer or pleading  
by a defendant seeking affirmative re-  
lief on new facts against a co-defend-  
ant without service or an issue or  
waiver.

Questions are presented upon the  
record in this case whether or not,  
under the provisions of the practice  
act of this State, the answers filed  
by Martin Gulling and the Washoe  
County Bank in the suit instituted by  
the Farmers' and Mechanics' Savings  
Bank, in so far as they sought affir-  
mative relief against co-defendants,  
are answers as contemplated by our  
statute, or whether they are in fact  
equitable cross-bills. If the latter,  
whether, or not, under the practice  
act, they are permissible pleadings,  
and further, if permissible pleadings,  
whether or not the dismissal of the  
plaintiff's complaint would not re-  
quire the dismissal of the entire pro-  
ceeding. These questions, however,  
under the view we have taken of this  
case are not deemed necessary to be  
determined.

The judgment and order of the dis-  
trict court are affirmed.

Talbot, J.

I Concur:

Norcross, J.

I Dissent:

Fitzgerald, C. J.

Filed Nov. 28, 1905.

W. G. Douglass,  
Clerk.

By J. W. Legate,  
Deputy.

### MILLARD CATLIN,

Harling,

Freighting

Draying

Trunks and Baggage

taken to and delivered at

all trains.

### ANNUAL STATEMENT

Of The State Life Insurance Company Indianapolis, Ind.	
Capital (paid up) .....	none
Assets (admitted) .....	3,160,083 31
Liabilities, exclusive of cash and net surplus .....	2,615,497 63
Income	
Premiums .....	444,901 77
Other sources .....	137,125 01
Total income, 1904 .....	4,224,033 78
Expenditures	
Losses .....	309,902 63
Dividends .....	65,240 11
Other expenditures .....	1,950,103 76
Total expenditures, 1904 .....	1,416,245 56
Business, 1904	
Risks written .....	23,276,143 00
Premiums thereon .....	805,648 06
Losses incurred .....	316,885 00
Nevada Business	
Risks written .....	10,000 00
Premiums received .....	2,353 43
Losses paid .....	5,000 00
W. S. Wynn Secretary.	

Mo. For the West.

Tell your friends that the colonist  
rates are going into effect March 1st,  
1905 and expire May 15, 1905. The  
rate from Chicago, Ill., \$31.00, St. Louis  
Mo., New Orleans, La., \$30.00, Council  
Bluffs Ia., Sioux City Ia., Omaha,  
Neb., Kansas City, Mo., Minneapolis,  
Tex. and Houston Texas, \$25.00. Rates  
apply to Main Line points in Califor-  
nia and Nevada.